JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 198/2000

BEFORE: THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

R v KEVIN SIMMONDS

Alonzo Manning for appellant

Miss Kathy Pyke & Miss Suzette Rodgers for Crown

October 16, 2001 and July 31, 2002

HARRISON, J.A:

This is an application for leave to appeal against the conviction and sentence of the appellant at the St Catherine Circuit Court on 29th November 2000, for the offence of capital murder of Lloyd Owens on 28th October 1999. The appellant was sentenced to suffer death in the manner authorized by law. We heard his application, treated it as an appeal, dismissed his appeal and affirmed his conviction and sentence. These are our reasons in writing.

The facts are that on 27th October 1999, at about 7:00 p.m. the prosecution witness Earl Davis and the deceased Lloyd Owens, were at one Cherry's bar in Kitson Town, in the parish of St Catherine. Davis was drinking

beer and the deceased was drinking rum mixed with beer. After drinking until about midnight they both left in a taxicab going home. The deceased was intoxicated, moreso than the witness Davis. The taxi man stopped at a roadside shop, which they all entered. The appellant was standing near to the entrance. The appellant demanded that the deceased buy him, the appellant, a drink. The witness went to them spoke to the appellant and told the deceased not to buy the appellant any drink. The appellant stretched what he was smoking towards the witness who said "who you giving that? I am a big man. I don't use drugs." The deceased bought him the drink. After a while the taxi man drove away and left them. Later they both left the shop and unable to get transportation started to walk home.

The deceased was walking on the road ahead of the witness Davis who then saw the appellant emerge from behind a post on the road and called to him. Davis told the appellant that he was going home. The appellant said to him "mi want a money." The witness told him that he did not have any. The appellant said "mi want a Nanny and mi deh go tek it from yuh friend." Davis retorted in protest, "no man, that can't work", whereupon the appellant started stabbing him. Davis then "... go down to sort of trick him." The appellant then went away along the road in the direction in which the deceased had gone. The appellant could not run too fast because the waist of the trousers he was wearing was below his hip. Davis started to follow the appellant, but he was

bleeding profusely and was getting weak. He turned back, went to one Lucille's yard, spoke to her and he was taken to the hospital. He was admitted.

Outside the roadside shop, on the road where they had been was a street light across the road, another light was on the Baptist Church building, and, a third was on the roadside shop. Davis said, "... at the roadside place there was ample light and opportunity for me to see his face", for a period of three minutes, referring to the appellant.

Davis had known the appellant before as 'Gilby,' for about five years, having seen him in the area at bus stops and other places. He would sometimes see him three times each week.

Detective Corporal Taylor having got a report, went to Byles District, Kitson Town, at 7:30 a.m. on 28th October 1991, saw blood stains on the roadside, and went to the Spanish Town Hospital. There he saw witness Earl Davis, bandaged all over his chest and abdomen. He spoke to Davis and thereafter commenced investigations into a case, of murder and robbery with aggravation, against the appellant. On 15th November 1999, he obtained a warrant for the arrest of the appellant. On the said day he attended a post mortem examination performed by Dr Clifford on the body of Lloyd Owens, in Spanish Town. Detective Taylor observed two stab wounds to the chest of the deceased and noticed that one of the side pockets of his pants was cut out. On 15th January 2000, he went to the Lionel Town Police Station in the parish of Clarendon, where he saw the appellant. He cautioned him and told him that Earl

Davis told him, Detective Taylor, that on 28th October 1999, he used a knife and stabbed him and then you killed Lloyd Owens. The appellant then responded:

> "Mi stab him but mi never mean fi kill him."

Detective Taylor was then taking the appellant to the Lionel Town Police Station when the appellant said to him:

> "Mr. Taylor I waan tell you how it go, how everything go."

Detective Taylor took the appellant to the office of Inspector Grant at the Spanish Town Police Station, where the appellant gave a written cautioned statement which he signed. Both Inspector Grant and Detective Taylor signed the said statement.

Dr Royston Clifford, consultant forensic pathologist in evidence stated that he performed a post mortem examination on the body of the deceased. There were two incised stab wounds. The first was in the left anterior chest at the level of the left breast, ½" long, between the 4th and 5th rib into the chest cavity, penetrating the left ventricle of the heart resulting in massive bleeding. The second wound was to the right anterior chest ¾" wide and 7" from the mid line. It progressed through the 7th and 8th rib into the chest cavity penetrating the right lobe of the liver resulting in bleeding. The cause of death was due to the multiple stab wounds inflicted with a sharp instrument such as a knife with a moderate to severe degree of force.

The appellant gave an unsworn statement from the dock. He said that, "whenever he leaves from work he goes straight home;" that he knew nothing

about what took place, and that Inspector Grant forced and beat him to sign the cautioned statement. The defence was therefore an alibi.

The cautioned statement, after a voir dire was conducted, was admitted in evidence as voluntary and a part of the prosecution's case. The said statement reads:

> "Dem call mi 'Gilby' as alias name. I am twenty-five years old and mi still live at Chapel Top right beside the Kitson Town-All Age School. Mi don't remember di date in October but mi know sey is either a Wednesday or a Thursday, mi did a drink some Stone Ginger Wine, some rum, at di bus stop in front di Baptist Church. There were two men dat approach mi. They were also drunk. Trying to assist dem and reasoning with dem mi walk with dem go down di road and mi beg a drive and leave dem go down di road. Mi come out di car at Burrows Crossing and mi walking up back towards di bus stop direction when mi meet both of them coming down. Mi beg one a money and di one wey still alive and him never have any. Mi in a state and mi did want a money and mi did have a knife and mi stab di one wey nuh have no money first and him drop and den mi stab di other man and him drop and mi cut out him pocket and mi get $800.00 and mi run go up a mi grandmother house where I saw mi sister and mi grandmother. Mi told dem dat something done wrong. Mi get myself in trouble and mi did hide di knife inna di fowl coop. And mi went away to Lionel Town in Clarendon where di police in Spanish Town come fi mi and mi tell dem what happen and mi carry dem go up wey mi put di knife but mi never see it. Mi grandmother did know wey it is and she is now in England. When mi at Lionel Town, mi hear sey one a di man die and mi know sey di man wey live did know mi and did seek assistance fi bring mi in but mi never get any, me never get any."

At the conclusion of the summing-up by the learned trial judge the jury deliberated for nineteen minutes and returned a verdict of guilty of capital murder.

Counsel for the appellant with the leave of the court, advanced as his grounds, summarized, the following:

(1) The learned trial judge should have discharged the jury when the witness Davis described the appellant as a "drug man", the learned trial judge in his summing-up said that the appellant was described as a 'coke head'.

(2) There was no circumstantial evidence from which the jury could conclude that it was the same person who stabbed the witness Davis and killed the deceased.

(3) There was no sufficient evidence of identification against the appellant due to the condition of the witness Davis.

(4) The alleged admission by the appellant to Det. Cpl. Taylor is inadmissible and if admitted the learned trial judge should have left the verdict of manslaughter to the jury.

(5) The alleged cautioned statement taken by Det. Insp. Grant was inadmissible – it was not voluntary; no justice of the peace was present and no reasons were given for its admission.

(6) A verdict of acquittal should be entered or a new trial ordered because of the misdirection of the learned trial judge.

Counsel for the appellant argued, as ground three that the evidence of identification of the appellant was unreliable because of the condition of the witness due to the consumption of beer, which drink must have adversely

affected his vision. The evidence of the prosecution witness Davis was that he saw the appellant at the roadside shop where he spoke to him and declined to accept what he was smoking. He again saw the appellant for three minutes on the road when the appellant demanded money and he then also conversed with him. On both occasions, the lighting was good. He had known the appellant for about five years and would see him several times each week.

The cross-examination of the witness Davis, elicited his denial of the suggestions of his impaired condition. It reads:

"Q You drink your rum, though?

A I drink rum periodically.

Q At times?

A At times

Q And that night you were drinking rum too?

A I wasn't. I was drinking beer.

Q And when you drink your rum and you get intoxicated, your eyesight becomes blurred, don't it? You can't see so well?

His Lordship: He said he was drinking beer that night.

Q Isn't that so, sir?

Miss Tyndale: I'm curious, M'Lord, is he asking him a general question about what normally occurs when someone is intoxicated or is he speaking specifically to the night in question?

His Lordship: Yes, counsel. What are you putting?

Q That night in question, wasn't your eyesight blurred?

A No, it wasn't.

Mr. Earl Davis: Cross-examined by Mr. Cousins: (3:40 p.m.)

Q You couldn't see sir?

A I could see.

Q It was a dark night, wasn't it?

A It was what?

Q It was a dark night?

A Gilby's face was visible to me

Q Eh?

A The accused face was visible to me. I could see him.

Q And I am suggesting to you, sir, that whoever was the man you saw there that night it was not this man you see, not Gilby, not Kevin Simmonds, don't it?

A I am positively sure that I saw Kevin Simmonds

Q And you were so plastered and your eyes were so blurred that when you say is this man you see is mistake you are making. Don't it, sir?

A I don't agree with that statement because if somebody like me – if I were so intoxicated how could I save my life after taking so much stab from the accused?

> Q After being so drunk from liquor and your eyes were so blurred you wouldn't know the man you see who stab you?
>
> A I wouldn't run to the lady's yard.
>
> His Lordship: Just tell him if you saw the person.
>
> The witness: I saw the person and that is Kevin Simmonds or whatever his name is.
>
> Q As a matter of fact you don't know this man at all. You don't know him.
>
> A I surely know him."

And further, in answer to a suggestion from counsel for the defence that he was drunk (at the time) the witness replied :

> "If You want to think so, but I know a drunken man couldn't do what I do to save my life."

This witness had earlier in examination-in-chief stated that when the appellant commenced stabbing him, in order to avoid death he pretended that he had fainted.

The learned trial judge having told the jury to examine the demeanour of the witnesses in coming to their decision on the facts did direct the jury's mind to the defence's contention of the condition of the witness Davis, in this respect. He said:

> "... the fulcrum of Mr. Davis's cross-examination had to do with whether he was so drunk that he was not able to make out anything, to remember and things like that. But you saw him and you remember some of the answers he gave to counsel. He said his eyesight was not blurred. He was drunk but not so drunk that he couldn't remember and see things. He

> wasn't so drunk that he didn't know – it was put to him that he was so drunk that he didn't know where he was. And then he said that, if you think he was so drunk, how him was able to go to Miss Lucille's yard and knock her up? Because you remember Miss Lucille said when she heard the knocking and came out, the person was leaning on a drum and wetting up himself with the water from the drum."

The learned trial judge directed the jury on the question of mistake in identification and alluded to recognition, the element in this case. He examined with them the circumstances, under which the witness Davis is alleged to have seen the appellant whom he had known for about five years in relation to the opportunity to observe him, the length of time and the nature of the lighting. Although the learned trial judge did not give to the jury the standard warning in **R v Turnbull,** no prejudice was occasioned thereby. There was ample evidence of identification of the appellant. The prosecution's case rested not solely on the identification evidence but in addition, on the cautioned statement of the appellant as well as his oral admission to Det. Cpl. Taylor, which together corroborated the identification evidence. This ground of appeal therefore fails.

Ground one is a complaint that the learned trial judge should have discharged the jury because of the witness Davis' description of him as a "drug man".

Apart from refusing the offer by the appellant to smoke, by the comment that "... I don't use drugs", the witness Davis when asked, in cross-examination,

> "Q You know anything else about him aside from that he was called Gilby?"

"A What I see with him is that he is a coke head."

Comments made by a witness at a trial prejudicial to an accused in the presence of a jury, may be dealt with in one of two ways, in the discretion of the learned trial judge. The jury does not necessarily have to be discharged. He may deal with it adequately in his summing-up to the jury, advising them not to take the statement into consideration in their deliberations on the facts: (**R v Weaver** (1967) 51 GAR 77). On the other hand, he may choose not to refer to the said statement in order to avoid to highlight it in the minds of the jury. Each case depends on its own facts. The first of the two options may well be the more desirable. See also **R v Wilton Dasilva** (unreported) SCCA 105/82. In the instant case the learned trial judge directed the jury in respect of the said statement, having previously preferred not to mention it, in these terms:

> "Now the other thing which the crown is asking me to ask you to remove from your minds. I think it comes up in two places. Mr. Davis said that when he went up to the accused man, he was smoking something and he stretched his hand towards him, presumably to offer him a smoke, and Mr. Davis said, 'Listen, man I am a big man. I don't deal with drugs.' That is the first one. The second time he referred to him as a 'coke head'. Davis did. Now, some of you might not even have remembered that Davis said that, but should you remember, and even if you didn't remember, I am asking you now to remove that bit of evidence from your minds and don't let it weigh or have any influence on your minds when you go to consider the charge that I have left to you'."

The evidence in the instant case was strong and overwhelming. We are of the view that that direction by the learned trial judge was adequate, in all the

circumstances. We agree with Miss Pyke for the crown that the direction by the learned trial judge served to assist the jury to deal properly with the said admitted prejudicial statements in their deliberations on the evidence. Ground one therefore also fails.

Ground two complains of an absence of circumstantial evidence to conclude that it was the same person who robbed the witness Davis and killed the deceased. The evidence led by the prosecution was sufficient for the jury to be satisfied that the appellant was properly identified by the witness Davis, to have emerged from behind the post on the road, demanded money, expressed the intention to "tek it from yuh friend," stabbed the witness Davis with a knife when he remonstrated and hurried off in the direction in which the deceased had gone. The further evidence that the deceased was found shortly after on the said road with stab wounds consistent with infliction by a sharp instrument such as a knife, with his pants pocket cut out, is of a sufficiently strong quality to enable a jury to draw the inference that it was the appellant who inflicted the fatal wounds. This evidence qualifies as classic circumstantial evidence as being consistent with infliction by the appellant and "inconsistent with any other rational conclusion." (**Hodges'** case 2 Lew. C.C. 227). Because there was this ample evidence, this ground also fails.

Ground four challenges the admissibility of the admission of guilt by the appellant to Det. Cpl. Taylor, but also complains that on admission the learned trial judge failed to leave the verdict of manslaughter to the jury. It is sufficient

at the outset to say that the learned trial judge did in fact leave for the consideration of the jury the verdict of manslaughter based on the said admission.

The evidence of Det Cpl. Taylor that was led by the prosecution, was in these terms:

> "Q Who do you refer to as 'Gilby'?
>
> A Kevin Simmonds
>
> Q Is that the accused?
>
> A Yes, who I knew before.
>
> Q Did you speak with 'Gilby'?
>
> A Yes, ma'am. I cautioned him and I told him that Earl Davis told me ...
>
> Q That Earl Davis told you?
>
> A Yes, that on the 28th of October 1999, he used a knife and stabbed him and then killed ...
>
> Q Did he respond to you?
>
> A Yes ma'am
>
> A He said, 'Mi stab him, but mi never mean fi kill him'."

This admission by the appellant was made in response to the report after the caution was administered by the police officer. It was spontaneous and voluntary and consequently properly admitted by the learned trial judge for consideration by the jury.

This statement "... Mi stab him but me never mean fi kill him," is a mixed statement containing both its exculpatory and incriminatory parts. The entire statement was considered by the jury in keeping with the principle in **R v Duncan** [1981] 73 Cr App R 359. The headnote to that case at page 360, inter alia, reads:

> "... where a mixed statement – one containing confessions and self-exculpatory parts – was under consideration by the jury in a case where the defendant charged had not given evidence, the simplest method, and one most likely to produce a just result, was to tell the jury that, in deciding where the truth lay, they had to consider the whole statement, both the incriminating parts and the excuses or explanations."

The exculpatory portion of the said statement, namely:

> "... but me never mean fi kill him"

is an expression of lack of intent to kill, the effect of which, if accepted by the jury would reduce the offence to one of manslaughter. The learned trial judge in the instant case did leave with the jury the possible verdict of manslaughter, on the basis of lack of intent. He directed the jury:

> "Now in every charge of murder, the crown must satisfy you to the extent that you feel sure. You must remember that he said he wasn't there. But the police said when they went for him, he made an admission, that it is before he gave the statement, you know. So, you have to bear in mind that the police gave evidence already, this is on the way from Lionel Town to Spanish Town, when he said, 'Mi stab him but mi never mean to kill him'. So he is referring to the death of Owens.

> I must tell you, Madam Foreman and members of the jury, that the intention of the person, the accused man, is an ingredient in the charge of murder. So, if you believe that, it is possible he could have said that 'him stab man with a knife but he never mean fi kill him' and you accept that, then you would say that he lacked the intention to kill, that is, if you believe that that go so. You have to look at what he was using. He was using a knife and, according to Dr Clifford, it is a sharp cutting instrument that caused the sort of injuries – runs right into the chest cavity, into the heart and one went into the liver. So, what would be the result? If you think that, well, notwithstanding the use of this lethal weapon, a knife, to stab him he could nevertheless, lack the intention to kill, then you would have to convict him for manslaughter because the intention not to kill would be an ingredient which the crown could not displace, because their witness tells you that him sey so. But I leave that with you for what it is worth because the policeman said he did tell him that."

The defence was however, one of alibi. The principle that there is no duty on a trial judge to leave a defence to a jury in circumstances where the said defence is raised by means of a statement of the accused arising on the prosecution's case, but which was later resiled from, because the accused, either gave no evidence or gave an unsworn statement at trial to the contrary, was stated in the case of **Callwood v R** (1967) 10 WIR 261 relying on a line of cases commencing with **Bratty v A.G. of Northern Ireland** [1961] 3 All ER 523. The headnote to the case reads, inter alia, at page 262:

> "... where, as here, there had been no evidence led by the defence and no cross-examination of the witnesses for the prosecution directed towards eliciting facts in support of these issues, the mere unsupported statement of the appellant to the police that he had stabbed the deceased in self-defence

> (which statement the jury by their verdict had rejected) did not constitute a proper foundation to justify leaving the issues of manslaughter or self-defence to the jury, and accordingly, the judge was under no duty to do so."

This Court of Appeal in **R v Von Starck** (unreported) SCCA 120/96 dated 16th February 1998, accepted the said principle. On appeal to the Judicial Committee of the Privy Council, their Lordships did not reject the principle, but based their decision on the fact that the earlier statement of the appellant blaming the ingestion of cocaine as the reason for his act was still a live issue when he made his later unsworn statement at his trial.

In the instant case, we are of the view that having left the verdict of manslaughter for consideration by the jury, the learned trial judge was more than generous to the appellant. There is no basis for any complaint in that regard. This ground also fails.

Ground five complains that the cautioned statement was inadmissible because of the absence of a justice of the peace at the time of its making and that the learned trial judge gave no reasons for its admission.

The well established principle governing the nature of a confession statement being used in evidence against an accused of a criminal trial, in order to make it admissible, is that it must be voluntary:

> "... in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised (excited) or held out by a person in authority (**Ibrahim v R** 1914-15 All ER Rep 874, 877 per Lord Sumner).

This principle was applied in **Ajodha v The State** [1981] 73 Cr. App. R. 129, and consistently followed in our courts. Voluntariness therefore goes to admissibility and it is a question of law for the trial judge. In the instant case the learned trial judge conducted a voir dire in determining that issue and concluded that the said statement was voluntary and admissible. Counsel for the appellant has advanced no reason to demonstrate that the said conclusion of the said judge is at fault, as a matter of law. There was evidence on which he could base his decision. There is no express rule or practice that requires that a justice of the peace be present at the time of taking of the statement. The Judges' Rule 1964 which are merely directory and which were adopted and followed in Jamaica, are not rules of law but rules of practice for the guidance of police officers. The rules do not themselves require the presence of a justice of the peace at the taking of a cautioned statement. In the instant case there is evidence that the police officer did make attempts to have a justice of the peace present, without success. That by itself did not affect the finding of voluntariness by the learned trial judge.

Furthermore, the said trial judge was under no absolute obligation to make an express declaration of the reasons for his ruling on the voluntariness of the statement. A similar complaint was made and dealt with by their Lordships' Board of the Judicial Committee of the Privy Council in **Wallace and Fuller v R** (1996) 50 WIR 387. Their Lordships, in their advice in respect of the ground of appeal that no reasons were given by the learned trial judge for his decision,

having conducted the voir dire, that the cautioned statement was voluntary, at page 394, per (Lord Mustill) said:

> "It relies on the fact that the trial judge, when announcing his decision that the statements were admissible in evidence, gave no reasons beyond saying that he found that the statements were given voluntarily by both the accused. The appellants contend for a rule of general application that a judge should always express his reasons for any procedural ruling given during a trial. Their lordships are wholly unpersuaded that a rule so broadly framed is now the law, or that if should be laid down for the future."

Their Lordships then referred to two decisions of the English Court of Appeal (Criminal Division) and one each of the Criminal Courts of Appeal of Western Australia and New Zealand, and continuing, at page 398 said:

> "Their lordships doubt whether these and other passages support the proposed general rule to its full extent, but if so they must respectfully disagree. Undoubtedly there will be occasions when good practice requires a reasoned ruling. For example, where the judge decides a question of law sufficient, but no more, must be displayed of his reasoning to enable a review on appeal. Again, on a mixed question of law and fact the judge should state his findings of fact so that the law can be put in context. Similarly, the exercise of a discretion will often call for an account (however brief) of the judge's reasoning, especially where the issue concerns the existence of the discretion as well as the way in which it should be exercised. These are no more than examples. In every case it will depend on the circumstances whether reasons should be given, and if so with what particularity. Frequently, there will be everything to gain and little to lose by the giving of reasons, even if only briefly. But other situations are different, as the present case well shows.

> In every instance, it is for the judge to decide whether the interests of justice call for the giving of reasons, and if so with what degree of particularity."

In the instant case there was no point of law involved, nor was there any issue concerning the exercise of the discretion of the learned trial judge. The complaint was that the appellant was given a blank sheet of paper which he signed and which was later completed by the police officers themselves as the cautioned statement. It was a mere question of fact for the learned trial judge as to which version he believed. Accordingly, in the circumstances of this case, there was no requirement that the learned trial judge give reasons. In any event at trial counsel for the appellant had ample opportunity and did challenge the witnesses for the prosecution in the presence of the jury subsequently, on the very issue of voluntariness. Subsequently, the learned trial judge although not in the accustomed form gave adequate directions to the jury with regard to their treatment of the cautioned statement. There is no virtue in the argument of counsel on this ground which consequently fails.

In his final ground of appeal, counsel for the appellant argued that the learned trial judge so mis-directed the jury that either a verdict of acquittal ought to be entered or a new trial ordered. Counsel for the appellant failed to direct us to any matters in addition to those complained of in his grounds argued. Again we agree with counsel for the crown that on examining the directions on the law, the issues of identification and its weaknesses, and the defence of alibi as put, the overall directions of the learned trial judge were unobjectionable.

For the above reasons we arrived at our decision as stated.